APPENDIX

PART 1: FEDERAL DISTRICT COURT ORDERS

PART 2: TENTH CIRCUIT APPELLATE ORDERS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIE BROWN, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	Case No. 05-2268
SCOTT FISHER, J.J. WEBER AND MIAMI COUNTY, Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this pro se civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendant arrested him without probable cause and detained him for nine hours in violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteen Amendments. This matter comes before the Court on plaintiff's Motion and Brief For Summary Judgment (Doc. #7) filed July 26, 2005. For reasons set forth below, the Court finds that plaintiff's motions should be overruled.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might effect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l. Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). The nonmoving party may not rest on its pleadings but must set forth specific facts. Id. at 1241.

The Court must view the record in a light most favorable to the parties opposing the motion for summary judgment. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51.

The Court affords a pro se plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While pro se complaints are held to less stringent standards than pleadings drafted by lawyers, pro se litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5 (1980); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992). The Court may not assume the role of advocate for a pro se litigant. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

In his motion for summary judgment plaintiff has failed to comply with D. Kan. Rule 56.1 regarding his statement of material facts. D. Kan. Rule 56.1 requires as follows:

> The memorandum or brief in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts to which the movant contends no genuine issue exist. The facts shall be numbered and shall refer with articularity to those portions of the record upon which movant relies.
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> * * *
>
> All facts on which a motion ... is based shall be presented by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories and responses to requests for admissions.

Plaintiff's statement of facts contains seven numbered paragraphs. Plaintiff set out facts "used in the complaint" and asserts that the facts are

uncontroverted by relying upon defendant Fisher's answer. Fisher's answer supports plaintiff's fact paragraph 1, which states that Fisher stopped plaintiff on a highway in Miami County, and paragraph 3, which states that Fisher wrote plaintiff a ticket for open container and failure to produce a driver's license. Plaintiff's five other number paragraphs (2 and 4 - 7) are dis-jointed and contain multiple facts. Further, as support for the facts in those paragraphs, plaintiff states that although Fisher denies those facts, the other defendants have not answered. As defendants point out, however, plaintiff has never served Miami County. Further, defendant Weber filed his answer with leave of court *after* plaintiff filed his motion for summary judgment. In any event, even if the facts set out in plaintiff's memorandum were uncontroverted, plaintiff has not shown that he is entitled to summary judgment on any of his claims.

IT IS THEREFORE ORDERED that plaintiff's Motion and Brief For Summary Judgment (Doc. #7) filed July 26, 2005 be and hereby is OVERRULED.

Dated this 8th day of December 2005 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIE BROWN, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	Case No. 05-2268-KHV
SCOTT FISHER, J.J. WEBER AND MIAMI COUNTY, Defendants.	)	

MEMORANDUM AND ORDER

Plaintiff brings this pro se civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants arrested him without probable cause and detained him for nine hours in violation of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteen Amendments. This matter comes before the Court on defendant Scott Fisher's Motion For Summary Judgment (Doc. #21) filed September 16, 2005, and defendant Joshua Weber's Motion For Summary Judgment (Doc. #25) filed September 19, 2005. For reasons set forth below, the Court finds that the defendants' motions should be sustained.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir. 1993). A factual dispute is "material" only if it "might effect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l. Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). The nonmoving party may not rest on its pleadings but must set forth specific facts. Id. at 1241.

The Court must view the record in a light most favorable to the parties opposing the motion for summary judgment. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 932 F.2d 1105, 1110 (10th Cir. 1991).

Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51.

The Court affords a *pro se* plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers, *pro se* litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5 (1980); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992). The Court may not assume the role of advocate for a *pro se* litigant. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Factual Background

Summary judgment procedure is governed by D. Kan. Rule 56.1, which states that a memorandum or brief in support of a motion for summary judgment "shall begin with a section that contains a concise statement of material facts as to which the movant contends no genuine issue exists." It also requires that an opposing memorandum begin with a section that contains a "concise statement of material facts as to which the party contends a genuine issue exists." Each fact must be numbered and refer with particularity to those portions of the record upon which the party relies. Also, in responding, the non-moving party shall state the "number" of each of movant's facts that is disputed. All facts on which

either party relies must be organized by and contained within numbered paragraphs, and all operative facts must be captured within the parties' statement of uncontroverted facts and response thereto.

Plaintiff's opposition brief does not dispute any specific facts in defendants' memoranda. Furthermore, plaintiff does not specifically contradict defendants' factual assertion with reference to those portions of the record on which he relies. See D. Kan. Rule 56.1[1] The Court recognizes that *pro se* litigants should not succumb to summary judgment merely because they fail to comply with the technical requirements involved in defending such motion. See Woods v. Roberts, No. 94-3159, 1995 WL 65457, at *2 (10th Cir. Feb. 17, 1995); Hass v. U.S. Air Force, 848 F. Supp. 926, 929 (D. Kan. 1994). The Court has therefore searched the record to determine whether genuine issues of material fact preclude the entry of

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1 D. Kan. Rule 56.1 provides as follows:

(b) Opposing Memorandum

(1) A memorandum in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of movant's fact that is disputed.

(2) If the party opposing summary judgment relies on any facts not in movant's memorandum, that party shall set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by subsection (a) above. All material facts set forth in this statement of the non-moving party shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the reply.

summary judgment for defendants. Where supported by the record, the Court has included plaintiff's additional facts and construed them in the light most favorable to plaintiff.

At 9:30 P.M. on February 25, 2004, Willie Brown was driving a pickup in Miami County, Kansas. Deputy Scott Fisher of the Miami County Sheriff's Office stopped Brown's truck because the passenger-side headlight was not illuminated. Brown immediately pulled over to the right. Fisher approached the truck and asked Brown for his driver's license. Brown asked Fisher what probable cause he had to stop him. Fisher told Brown that one of his headlights was out. Brown again asked to see Brown's driver's license. Brown asked if he was under arrest. Fisher told Brown that he was not under arrest, but that if he did not produce a driver's license, he would arrest him. Brown refused to provide his driver's license. Fisher then went back to his patrol car. As Fisher was walking toward his patrol car, plaintiff got out of his car to look behind his seat for his briefcase. Fisher turned and ordered Brown to get back inside his car. Brown complied, and Fisher went to his patrol car and called for backup.

Deputy Fisher returned to Brown's vehicle, where Brown was looking through his briefcase and trying to find his driver's license. Fisher told Brown that he was under arrest and told him to get out of his car. Fisher patted Brown down, handcuffed him behind his back and placed him in the patrol car.

Brown doesn't complain about how he was handcuffed or placed in the car.[2]

Fisher then returned to Brown's vehicle and asked the passenger to get out of the vehicle. Fisher picked up plaintiff's billfold from the open briefcase and returned to the patrol car. Fisher opened the billfold and found Brown's driver's license.

At that point, Trooper Joshua Weber arrived on the scene. Weber asked Brown about his driver's license, to which Brown responded, "Are we having curbside court?" Weber did not speak further with Brown, and had no physical contact with him. Weber then recovered an open beer can from the passenger compartment of Brown's truck and transported the can to the Miami County Jail.

The officers took Brown to the Miami County Jail, where Fisher asked Brown if he would post a $35 bond. Brown declined, stating that he had not committed any crime. Jailers then took Brown's photograph and fingerprints and booked him into jail. A jailer delivered Brown a citation. Brown was released from jail the next morning at 7:30 A.M.

Under 42 U.S.C. § 1983, plaintiff alleges that defendants violated his rights under the Fourth, Fifth, Eight, and Fourteenth Amendments of the United States Constitution. In particular, plaintiff alleges that defendants violated his Fourth

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[2] Fisher was polite during the entire stop and did not physically mistreat Brown.

Amendment rights when they arrested him without probable cause and searched his car. Although plaintiff also alleges in some conclusory fashion that defendants violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, the complaint alleges no facts which implicate those rights.

ANALYSIS

Defendants assert that they are entitled to qualified immunity on plaintiff's Fourth Amendment claim. "Government officials performing discretionary functions generally are shielded from liability for civil damages in so far as the conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The affirmative defense of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Gross v. Pirtle, 245 F.3d 1151, 1155 (10th Cir. 2001) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Once the defense has been raised, plaintiff has the burden to establish both the defendants' actions violated a constitutional or statutory right and that the right was "clearly established" at the time of the relevant conduct. See Medina v. Cram, 252 F.3d 1124, 1128 (10th Cir. 2001). If plaintiff satisfies this two-part burden, defendant must demonstrate that his actions were objectively reasonable in light of the law and the information he possessed at the time. See Martin v. Bd. of County Comm'rs, 909 F.2d 402, 405 (10th Cir. 1990).

Defendants argue that plaintiff has not met his burden to show that his arrest on February 25, 2004, violated his Fourth Amendment right to be free from unreasonable searches and seizures. Under settled case law, a police officer may make a warrantless arrest if he has probable cause to believe that an individual has committed or is committing a crime. See Thompson v. City of Lawrence, Kansas, 58 F.3d 1511, 1515 (10th Cir. 1995); United States v. Maher, 919 F.2d 1482, 1485 (10th Cir. 1990). Probable cause exists if the arresting officer knows of facts and circumstances which are reasonably trustworthy and sufficient to lead a prudent person to believe that the individual has committed or is committing an offense. See Thompson, 58 F.3d at 1515. This determination must be made "in light of circumstances and facts as they would have appeared to a prudent, cautious, trained police officer. Maher, 919 F.2d at 1485-86.[3]

Here, defendants have presented evidence that Fisher stopped Brown's vehicle at 9:30 P.M. because

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[3] In civil rights cases which challenge the validity of warrantless arrest, the Tenth Circuit has noted that the question of probable cause is ordinarily one of fact for the jury:

> It is true that the issue of probable cause ordinarily is for the judge rather than the jury. That is because the issue usually arises in the context of a motion to suppress evidence, which the judge decides. But where the issue arises in a damage suit, it is ... a proper issue for a jury if there is room for a difference of opinion. The underlying issue in deciding whether the police had probable cause to do what they did is reasonableness, which is also the underlying issue in deciding negligence - a classic jury issue.

DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990). In this case, however, the material facts are undisputed and compel a finding in favor of the defendants.

he had observed that the passenger-side front headlamp was not working. This was a traffic infraction, which provides sufficient grounds to support the initial stop. See Kan. Stat. Ann. §§ 8-1705, 1728(a). Further, Brown does not dispute that he refused to produce his driver's license, in violation of Kan. Stat. Ann. § 8-244, which provides as follows:

> Every licensee shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle, *and shall display the same, upon demand* of any officer of a court of competent jurisdiction or any peace officer, examiner or officer of the division of vehicles. However, no person charged with violating this section shall be convicted if such person produces in court or the office of the arresting officer a driver's license theretofore issued to such person and valid at the time of arrest.Kan. Stat. Ann. § 8-244 (emphasis added).

Kansas law authorizes arrests under several specified circumstances. Specifically Kan. Stat. Ann. § 22-2401 provides as follows:

> A law enforcement officer may arrest a person under any of the following circumstances: * * *
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> (c) The officer has probable cause to believe that the person is committing or has committed:
>
> (1) A felony; or

(2) a misdemeanor, and the law enforcement officer has probable cause to believe that:

(A) The person will not be apprehended or evidence of the crime will be irretrievably lost unless the person is immediately arrested;

(B) the person may cause injury to self or others or damage to property unless immediately arrested; or

(C) the person has intentionally inflicted bodily harm to another person.

(D) Any crime except a traffic infraction or a cigarette or tobacco infraction, has been or is being committed by the person in the officer's view.

The Kansas law which requires a driver to display his driver's license, Kan. Stat. Ann. § 8-244, is not categorized as a "traffic infraction" under Kansas law. See Kan. Stat. Ann. § 21-3105(2); Kan. Stat. Ann. § 8-2118(c). Therefore, when plaintiff refused to produce his driver's license, Fisher had authority to arrest plaintiff because in his view, defendant had committed a crime, other than a traffic infraction. See Kan. Stat. Ann. § 22-2401(d).

In Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001), the Supreme Court held that "[i]f an

officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." In Atwater, an officer observed plaintiff driving without a seat belt restraining her or her children. The officer arrested her for violating the Tex. Transp. Code Ann. §545.413 (1999), which makes it a misdemeanor to drive or allow children to ride in a vehicle without wearing an available seatbelt. The Supreme Court found that the arrest satisfied constitutional requirements. Plaintiff did not dispute that the officer had probable cause to believe that she had committed a crime in his presence; she admitted that neither she nor her children were wearing seatbelts, as required by Texas law. The Court found that the officer was authorized to make a custodial arrest without balancing costs and benefits of determining whether plaintiff's arrest was in some sense necessary. The Atwater Court also noted that the arrest was not made in an "extraordinary manner, unusually harmful to [plaintiff's] privacy or ... physical interests." Id. (quoting Whren v. United States, 517 U.S. 806, 818 (1996).

The Court stated that above all else, whether a search or seizure is "extraordinary" turns above all else, on the manner in which it is executed. Id. The Court stated that plaintiff's arrest was surely humiliating, but it was no more harmful to privacy or physical interests than the normal custodial arrest. Plaintiff was handcuffed, placed in a squad car and taken to the local police station, where officers asked her to remove her shoes, jewelry, glasses, and to empty her pockets. Defendants then took her photograph and placed her in a cell, alone for about an hour.

Defendants then took plaintiff before a magistrate and released her on bond. The Court found that the arrest and booking were inconvenient and embarrassing to plaintiff, but not so extraordinary as to violate the Fourth Amendment. Id. at 348 (rejecting line between "jailable" and "fine-only offenses" because officer on street may not be able to differentiate the two.)

As in Atwater, the officer here had probable cause to believe that plaintiff had committed a crime, albeit a minor one. Plaintiff does not allege or cite any evidence that Fisher conducted the arrest in an extraordinary manner. The uncontroverted facts show that the arrest did not violate plaintiff's Fourth Amendment rights.

Plaintiff also alleges that the officers' search of the vehicle violated his Fourth Amendment rights. Defendants assert that the search of plaintiff's car did not violate the Fourth Amendment because it was a lawful search incident to arrest. This Court recently reviewed the standard for an automobile search incident to an arrest. See McCormick v. Hadl, No. 03-2630-KHV, 2005 WL 1799260 (D. Kan., June 28, 2005).

Law enforcement officers must ordinarily obtain a warrant, based on probable cause, before conducting a search. See New York v. Belton, 453 U.S. 454, 457 (1981). The Supreme Court has recognized an exception to this rule where officers conduct a warrantless search incident to a lawful arrest. See Chimel v. California, 395 U.S. 752, 762-63 (1969). In the context of a lawful arrest an occupant or recent occupant of an automobile, the Fourth

Amendment allows the officer to search the passenger compartment of a vehicle and examine the contents of any containers found within the passenger compartment as a contemporaneous incident of arrest. Belton, 453 U.S. at 460; see United States v. Franco, 981 F.2d 470, 473 (10th Cir. 1992) (discussing Belton in context of recent occupant). In Franco, the Tenth Circuit held that the search of defendant's automobile was incident to his arrest because defendant "exercised control over his vehicle and its contents at the time of the arrest and during the commission of the offense, and was its immediate occupant." Id. Belton is based on the rationale that the search prevents the arrestee from reaching for weapons or destructible evidence. See id. at 472.

In 2004, the Supreme Court further defined when officers may search an automobile incident to a lawful arrest. See Thornton v. United States, 541 U.S. 615 (2004). In Thornton, an officer followed defendant and determined that his license tags had been issued for a car model other than what he was driving. See id. at 618. Before the officer had an opportunity to pull him over, however, defendant parked and got out of his car. See id. The officer saw defendant get out the car, then parked his own car, accosted defendant and requested his driver's license. See id. Because defendant appeared nervous, the officer asked if he could pat him down. See id. In defendant's pockets, the officer found bags of marijuana and cocaine. See id. The officer handcuffed defendant, told him that he was under arrest and placed him in the back seat of the patrol car. The officer then searched the defendant's car and found a handgun under the driver's seat. See id.

The Fourth Circuit Court of Appeals noted defendant's concession that he was in "close proximity, both temporally and spatially," to his vehicle. It therefore found that the car was within his immediate control and that the search was reasonable under Belton. See id. at 2130. The Supreme Court affirmed. It first noted that Belton did not depend on whether the arrestee got out of the vehicle at the officer's direction or whether the officer initiated contact while defendant remained in the car. Id. at 2131. The Supreme Court reasoned that the stress and uncertainty of an arrest "is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle." Id. The Supreme Court emphasized that Belton applies to both "occupants" and "recent occupants" of a vehicle. It therefore concluded that even though not all contraband in the passenger compartment may be readily accessible to a recent occupant, "[t]he need for a clear rule ... justifies the sort of generalization which Belton enunciated." Id. at 2132. The Supreme Court held that "[o]nce an officer determines that there is probable cause to make an arrest [of a recent occupant of a vehicle], it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment." Id. It further held that "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest." Id. An arresstee's status as a "recent

occupant" may turn on his temporal and spatial relationship to the car at the time of the arrest and search. Id. at 2131.

In this case, Fisher had probable cause to arrest plaintiff, who was a recent occupant of the vehicle. It was therefore reasonable for the officers to search the passenger compartment. Fisher and Weber are entitled to summary judgment on plaintiff's Fourth Amendment claims.

The Court notes that although plaintiff has sued Miami County, Kansas, he has not alleged that the County violated his rights through a county custom, practice, or policy or by the act of a final decision-maker. County liability under Section 1983 does not automatically spring from the acts of county employees. Pembaur v. City of Cinncinnati, 475 U.S. 469, 478 (1986), but results when the county itself causes the wrong. Such wrong may arise from official policy, e.g. "acts which the [county] has officially sanctioned or ordered," or from the act of an ultimate county decision-maker. Id. at 479-80. Plaintiff has not alleged any facts as to county policy or acts by county decision-makers. Plaintiff is therefore ordered to show cause in writing on or before March 10, 2006, why the Court should not dismiss his claims against Miami County.

IT IS THEREFORE ORDERED that defendant Scott Fisher's Motion For Summary Judgment (Doc. #21) filed September 16, 2005 and defendant Joshua Weber's Motion For Summary

Judgment (Doc. #25) filed September 19, 2005 be and hereby are SUSTAINED.

IT IS FURTHER ORDERED that plaintiff shall show cause in writing on or before March 10, 2006 why the Court should not dismiss his claims against Miami County.

Dated this 27th day of February, 2006 at Kansas City, Kansas.

/s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIE BROWN, Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	Case No. 05-2268
SCOTT FISHER, J.J. WEBER AND MIAMI COUNTY, Defendants.	)	

ORDER

Willie Brown, *pro se*, brings this civil rights action under 42 U.S.C. § 1983, alleging that defendants violated his constitutional rights. Complaint (Doc. #1) filed June 27, 2005. Specifically, plaintiff alleges that Scott Fisher and J. J. Weber arrested him without probable cause and detained him for nine hours in violation of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteen Amendments. On February 27, 2006, this Court granted summary judgment in favor of Fisher and Weber. See Memorandum and Order (Doc. #40). The Court also ordered plaintiff to show cause in writing why it should not dismiss his claim against Miami County. This matter is before the Court on plaintiff's Reponse to Show Cause Order (Doc. #41) filed March 9, 2006.

In his response, plaintiff contends that Miami County is in default because it has not filed an answer in this case. As the Court noted in a previous order, however, plaintiff has never served summons or complaint upon Miami County. Therefore, under Rule 4(m), Fed.R.Civ.P., the Court may dismiss without prejudice plaintiff's claims against Miami County.[1] Fed. R. Civ. P. 4(m) (court "may dismiss the case if service of the summons and complaint is not made upon a defendant within 120 days after filing of the complaint").

IT IS THEREFORE ORDERED that plaintiff's claims against Miami County are dismissed without prejudice.

Dated this 9th day of May, 2006 at Kansas City, Kansas.

/s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

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[1] Alternatively, plaintiff asserts that he has a viable claim against Miami County because undersheriff Mark Schmidt had a duty to investigate whether the officers acted with probable cause. The Court has already concluded, however, that Fisher and Weber had probable cause to arrest plaintiff and search his car. Plaintiff still has not alleged any county policy or any action by Schmidt or any other County policymaker which violated his constitutional rights. Pembaur v.City of Cinncinnati, 475 U.S. 469, 479-80 (1986) (no respondeat superior liability under Section 1983; county liability rises from acts which county has officially sanctioned, or from act of ultimate county decision-maker).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207 D. Kan. (D. C. No. 05-CV-2268-KHV)

ORDER AND JUDGMENT*

Before **HENRY, BRISCOE,** and **O'BRIEN**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P.

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Willie Brown was stopped by a police officer for a minor traffic violation. He refused to present his driver's license and, as a result, was arrested and spent a night in jail. At some point, his vehicle was searched by another officer and an open beer can was discovered in the cab of his pick-up truck. Brown brought this case against the two officers, Scott Fisher and J.J. Weber, and the County of Miami, Kansas, claiming a violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. The district court allowed Weber to answer out of time, and then granted summary judgment in favor of Fisher and Weber. The district court dismissed Brown's claims against the County without prejudice for failure of service. Appearing *pro se*,[1] Brown appeals from these decisions. We dismiss in part, reverse in part, and affirm in part.

I. BACKGROUND

At 9:30 p.m. on February 25th, 2004, Miami County Deputy Sheriff Scott Fisher stopped Brown's truck because the passenger-side headlight was not

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[1] We liberally construe Brown's pleadings, on account of his *pro se* status, but we hold Brown to the same rules of procedure as other litigants. *See Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992).

illuminated.[2] Fisher approached Brown and asked to see his driver's license. In response, Brown asked Fisher whether he had probable cause for the stop. Fisher responded that one of Brown's headlights was out and again asked to see Brown's driver's license. Brown asked if he was under arrest. Fisher replied he was not under arrest, but would be if he did not produce a driver's license. Fisher walked back to his patrol car and Brown got out of his truck to look for his license. Fisher ordered Brown back in the truck and called for backup. When Fisher returned to Brown's truck, Brown was sitting in the driver's seat, looking in his briefcase for his license.

Fisher arrested Brown, frisked him, handcuffed him, and placed him in the patrol car. Fisher then went to Brown's truck and found Brown's billfold in the briefcase. He searched the billfold in Brown's presence and discovered Brown's valid Kansas driver's license. At this point, Deputy Sheriff J.J. Weber arrived on-scene. Fisher removed Brown from the patrol car and Weber questioned Brown about his driver's license. Thereafter, Fisher transported Brown to the police station, which took between fifteen and twenty minutes. While Brown was in transport, Weber searched Brown's truck and found an open, non-alcoholic beer can in the passenger area.

At the station, Brown was issued a citation for driving with an open alcoholic beverage container and

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[2] Though not relevant to the issues raised on appeal, there was a fourteen-year-old passenger riding with Brown at the time of the stop.

for failing to display a driver's license upon demand. Brown refused to post a $35.00 bond and spent the night in the Miami County Jail. Brown was released the next morning.[3]

On June 27, 2005, Brown filed a complaint against Fisher, Weber and Miami County under 42 U.S.C. §1983, alleging violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. Fisher answered Brown's complaint on July 18, 2005. On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted this motion on August 10, 2005, without opinion. Both Fisher and Weber then filed motions for summary

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[3] If Brown was convicted this action would be barred. *Heck v. Humphrey*, 512 U.S. 477 (1994). The record is equivocal on that score. Brown alleges, in Paragraph 7 of his Complaint, he "appeared as directed on the ticket on March 25, 2004, at 9 A.M. in the Miami County courthouse before Judge Richard M. Smith, talked to the judge, and left. No charges were filed or prosecuted." Fisher and Weber deny the allegations contained in this paragraph, claiming they lack sufficient information to form a belief as to their truth or falsity. (R. Vol. 1, Doc. 5 at 2; Doc. 11 at 2.) In his Motion for Summary Judgment, Officer Fisher claims, as an uncontested material fact: "Brown was booked into the jail at about 10:30 p.m. He was released the next morning at about 7:30 a.m. by Undersheriff Mark Schmidt. He had been given a citation while in his jail cell which was delivered by one of the jailers." (R. Vol. 1, Doc. 22 at 7.) Fisher does not include any facts relating to the ultimate outcome of the citation. Brown testified at his deposition that he was delivered a citation in his jail cell. (R. Vol. 1, Doc. 22 attach. at 44) He also testified he showed up in court and his case was not called. (*Id.* at 47.) He claimed he did not ask why his case was not called, and did not know whether the case was still pending. (*Id.* at 50.) Reading the record most charitably to Brown, we assume he was not convicted.

judgment on all claims, and the district court granted these motions on February 27, 2006. The court determined that the allegations in Brown's complaint implicated only the Fourth Amendment, and Fisher and Weber were entitled to judgment as a matter of law because neither the arrest nor the search violated Brown's Fourth Amendment rights. The court ordered Brown to appear and show cause as to why his claims against the County should not be dismissed, based on his failure to allege "the County violated his rights through a County custom, practice or policy or by the act of a final decision-maker." Brown argued the merits of his case against the County, but the court did not consider the merits. Instead it dismissed Brown's claims against the County without prejudice for failure of service.

On appeal, Brown argues the district court erred by: (1) allowing Weber to answer out of time; (2) granting summary judgment to Fisher and Weber; and (3) dismissing Brown's claims against the County. We first consider Brown's claims against the County, and then his claims against Fisher and Weber.

II. DISCUSSION

A. *The County of Miami*

Brown filed his complaint on June 27, 2005. On July 1, 2005, Brown's process server served a copy of the summons and complaint upon an employee of the Clerk of the District Court of Miami County, Kansas. On July 6, 2005, Brown filed a proof of service upon Miami County, based upon serving the

Clerk of the District Court. Brown never served the Miami County Clerk or any member of the governing body of Miami County.[4]

The district court dismissed Brown's claims against the County without prejudice because Brown failed to properly serve the summons and complaint upon the County within 120 days of filing as required by Rule 12(m) of the Federal Rules of Civil Procedure ("if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time ... "). While the court did not directly consider the merits of Brown's claims against the County, it did remark in a footnote that Brown had not alleged any policy or action by the county which violated his constitutional rights. On May 9, 2006, the district court entered a separate judgment, dismissing without prejudice Brown's claims against the County.

1. Jurisdiction

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[4] Pursuant to Rule 4(j)(2) of Federal Rules of Civil Procedure, service upon a state, municipal corporation or other governmental organization is effected by delivering a copy of the summons and complaint to its chief executive officer or by serving the summons and complaint "in the manner prescribed by the law of that state." Kansas law provides service upon a county is effected by serving one of the county commissioners, the county clerk, or the county treasurer. Kan. Stat. Ann. § 60-304(d)(1).

Before we consider the district court's dismissal of Brown's claims against the County, we must insure we have jurisdiction. Though neither party has raised a jurisdictional challenge, "we have an independent duty to examine our own jurisdiction." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001). Under 28 U.S.C. § 1291, only "final decisions" are appealable. *See* 28 U.S.C. § 1291 ("the courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..."). The question, then, is whether a dismissal without prejudice for failure of service of process constitutes a final, appealable decision.

In *Amazon*, we explained "[a]lthough a dismissal without prejudice is usually not a final decision, where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." 273 F.3d at 1275. There, we held the district court's decision to decline supplemental jurisdiction and dismiss state claims without prejudice for refiling in state court effectively disposed of the entire action in federal courts and was thus ripe for review. *See id.* In *Moya v. Schollembarger*, we noted "a dismissal [ ] without prejudice does not necessarily make it non-final under Section 1291." 465 F.3d 444, 448 (10th Cir. 2006). We set forth three principles for determining whether an order of a district court is final and appealable. *Id.* at 450. The third principle is relevant here: "When the dismissal order expressly grants the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss

the complaint [not the entire action]; the dismissal is thus not a final decision." *Id.* at 451.

Here, it appears the district court did not intend to dismiss Brown's entire cause of action and finally dispose of his case. The court's order allowed Brown to re-file and properly serve his complaint upon the County. The court even indicated in a footnote what Brown might need to do to survive a motion to dismiss as to his claims against the County. Presumptively then, the order of dismissal was not final and appealable.[5] Though, as stated in *Moya*, a dismissal without prejudice is not necessarily non-final, it is here, where it invites a plaintiff to correct the procedural defect and re-file. We therefore dismiss this portion of Brown's appeal for lack of jurisdiction.[6]

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[5] This is not inconsistent with prior cases in which we reviewed orders of dismissal with prejudice for failure to comply with the Federal Rules of Procedure. See, e.g. Nasious v. Two Unknown B.I.C.E. Agents, 492 F.3d 1158, 1161 (10th Cir. 2007) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to comply with the pleading requirements contained in Fed. R. Civ. P. 8); Olsen v. Mapes, F.3d 1199, 1200 (10th Cir. 2003) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to effectuate service under Fed. R. Civ. P. 4(i)).

[6] Brown's claims against the County are subject to a two-year statute of limitations. See Wallace v. Kato, 127 S.Ct. 1091, 1094, reh'g denied, 127 S.Ct. 1020 (2007) (statute of limitations applicable to § 1983 actions is what state law provides for personal injury torts). The dismissal of Brown's claims against the County more than two years after his cause of action accrued does not convert the dismissal without prejudice into a *de facto* dismissal with prejudice because Brown could have taken advantage of Kansas's tolling rules and refiled his

B. *Fisher and Weber*

On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted Weber's motion without opinion, allowing Weber to file and serve his answer within five days of the date of the order. The court later granted Fisher and Weber's motions for Summary judgment, holding the defendants were entitled to judgment as a matter of law on Brown's claim for violation of his rights under the Fourth amendment (according to the court, the only viable claim) because fisher had probable cause to arrest Brown and it was therefore reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle.

1. Jurisdiction

We continue to examine our jurisdiction. *See Amazon,* 273 F.3d at 1274. Generally, "A party cannot obtain appellate jurisdiction where the district court has dismissed one claim without prejudice because the case has not been fully disposed of in the

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complaint. *See Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959, 962 (10th Cir. 1991) ("Limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules.") (internal quotations and citation omitted); Kan. Stat. Ann. § 60-518 ("If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff ... may commence a new action within (6) months after such failure.").

lower court." *Jackson v. Volvo Trucks N. Am.., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006); *see also Catlin v. United States*, 324 U.S. 229 at 233 (1945), *superseded by statute*, 9 U.S.C. § 15 (generally, a decision is final under 28 U.S.C. § 1291 only when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). There is an exception to this general rule where the unadjudicated claims relate only to a defendant who was never served. Under this exception, an order finally disposing of the interests of all defendants who have been served is appealable because the unserved defendant was never made a proper party to the action. *See Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986). We find this exception to be applicable here.

In *Bristol*, we held the fact that two (of twenty-one) defendants were not considered in the district court's order and judgment "does not prevent the decision of the district court from being final." *Id.* We explained "[t]hese unserved defendants were made parties to this lawsuit. It was not necessary for the district court to enter an order dismissing them prior to its entry of the order and judgment." *Id.* (citations omitted). *Bristol* was cited by the Eleventh Circuit in *Insinga v. LaBella*, where it held when "final judgment has been entered as to all defendants who have been served with process and only unserved defendants remain, the district court's order may be considered final under U.S.C. § 1291 for purposes of perfecting an appeal." 817 F.2d 1469, 1469-70 (11th Cir. 1987) (citing cases from the Tenth, Ninth, Second and Third Circuits).

In *Federal Savings & Loan Insurance Corporation v. Tullos-pierremont,* the Fifth Circuit expanded upon this analysis. 894 F.2d 1469 (5th Cir. 1990). The issue before the court was whether an appeal was timely where the plaintiff did not appeal immediately after the district court granted summary judgment to one of eight defendants, but rather, appealed only after seeking the dismissal without prejudice as to four defendants who had never been served (the other three defendants had been dismissed for lack of personal jurisdiction early on in the case). *Id.*. at 1470-71. The court adopted a brightline rule: "where a judgment of dismissal is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final, and therefore, appealable under section 1291, without a Rule 54(b) certificate." *Id.* at 1473. The court rejected a "further adjudication test" which would have meant a judgment of dismissal is only rendered final as to all served defendants if further adjudication as to the unserved defendants is unlikely. *Id.* The court reasoned the brightline rule provided a clearer rule for litigants, and cautioned the further adjudication test would "swallow the rule" because "in nearly every case [where no disposition has been made as to an unserved defendant] it is almost certain that at *some* time *some* further district court action will be taken in the case respecting the claim against that [unserved] defendant." *Id.*[7]

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[7] This case has been cited with approval, though not in this Circuit. *See, e.g. Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 700 (7th Cir. 2004).

While we decline to adopt the brightline rule, we hold the mere fact that there may be subsequent adjudication between Brown and the County does not prevent the judgments as to Fisher and Weber from being final. It would be a different case if Brown had voluntarily sought the dismissal of his claims against the County. We have previously held a plaintiff cannot voluntarily dismiss some of its claims without prejudice in order to make a non-voluntary dismissal with prejudice ripe for review. *See Cook v. Rocky Mountain Bank Note Co.*, 974 F. 2d 147, 148 (10th Cir. 1992); *Heimann v. Snead*, 133 F.3d 767, 769 (10th Cir. 1998). It would also be a different case if the alleged defect in service as to the County had not yet been adjudicated. *See Tullos-Pierremont*, 894 F.2d at 1474, n.5 (noting the case did not present, and the court did not speak to, a situation where all defendants were served, but the propriety of the service as to some was contested and either unresolved or sustained but without dismissal as to the contesting defendant). Because neither of these circumstances is presented here, we have jurisdiction to review the district court's orders allowing Weber to file his answer out of time and granting summary judgment in favor of Weber and Fisher.

2. Extension of Time to File an Answer

Brown contends the district court erred in permitting Weber to file his answer out of time, and should have instead granted default judgment against Weber based on his failure to answer. Under Rule 6(b) of the Federal Rules of Civil Procedure, the district court may permit the late filing of an answer if it finds the late filing resulted from "excusable neglect." We review a district court's decision

extending time to file for abuse of discretion. *Panis v. Mission Hills Bank,* N.A., 60 F.3d 1468, 1494 (10th Cir. 1995). Weber argued to the district court that he should be granted an extension of time because Brown improperly served an administrative assistant at a Kansas Highway Patrol office who was not authorized to receive service of process on his behalf. According to Weber, the delay resulting from the improper service constituted "excusable neglect." The district court did not abuse its discretion in allowing Weber to file out of time on this basis.

3. Summary Judgment

The district court granted summary judgment to Fisher and Weber, concluding they were entitled to qualified immunity because Brown did not establish a violation of his rights under the Fourth Amendment. According to the district court, Fisher had probable cause to arrest Brown, and it was reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle incident to the arrest.

We review a district court's grant of summary judgment de novo. *United States ex rel. Bahrani v. Conagra, Inc.,* 465 F.3d 1189, 1197 (10th Cir. 2006). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)). We review summary judgment orders deciding qualified immunity somewhat differently from other summary judgment decisions. *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir. 2001). Where a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff, who must establish: (1) the defendant's actions

violated a constitutional or statutory right; and (2) the right at issue was clearly established at the time of the defendant's unlawful conduct. *Id.* If the plaintiff fails to meet this "heavy two-part burden," the defendant is entitled to qualified immunity. *Id.*

The district court correctly granted summary judgment to Fisher because his arrest of Brown was reasonable, as was his search of Brown's vehicle. However, the district court erred in granting summary judgment to Weber because his search of Brown's vehicle was not reasonable, as it was conducted while Brown was being transported by Fisher to the police station.

A. Arrest

"If an officer has probable cause to believe that an individual has committed even a minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista,* 532 U.s. 318, 354 (2001). "'The constitutionality of an arrest does not depend on the arresting officer's state of mind." *Apodaca v. City of Albuquerque,* 443 F.3d 1286, 1289 (10th Cir. 2006). "All that matters is whether [the officer] possessed knowledge of evidence that would provide probable cause to arrest [the defendant] on some ground," *Id.*

The district court concluded Fisher had probable cause to arrest Brown for failing to display his driver's license upon demand, in violation of state law. *See* Kan. Stat. Ann. § 8-244 ("Every licensee

shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle, and shall display the same, upon demand of any . . . peace officer . . . ."). There are two difficulties with this conclusion. First, viewing the facts in the light most favorable to Brown, it is not clear that Brown refused to provide his license, as he testified he was looking for his license in his briefcase at the time of his arrest. Second, it is not clear that Fisher could detain Brown after finding Brown's valid license. We have held "[I]f the police learn information that destroys their probable cause to arrest a defendant, the arrest may become illegal." *United States v. Edwards*, 242 F.3d 928, 934 (10th Cir. 2001).

We need not resolve either of these difficulties, for we can affirm the district court on another basis supported in the record. *See Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1164 n.17 (10th Cir. 2004))"We may affirm on any basis supported by the record."). Brown does not dispute that he was driving with an inoperable headlight at nighttime at the time he was pulled over. This constitutes a violation of state law, and is a valid basis for his arrest. *See* Kan. Stat. Ann. 8-1703(a)(1) ("Every vehicle . . . upon a highway within this state, at all times shall display lighted head and other lamps . . . . :[f]rom sunset to sunrise"). Because Brown cannot establish that Fisher violated his constitutional rights in arresting him, Fisher is entitled to qualified immunity on Brown's claim for unlawful arrest.

B. The Search of Brown's Vehicle

While a search conducted without a warrant is usually per se unreasonable, warrantless searches are permissible under certain "well-delineated exceptions." *United States v. Franco*, 981 F.2d 470, 472 (10th Cir. 1992). For example, a warrant is not required for a search "incident to an arrest."[8] *Id.* In *New York v. Belton*, the Supreme Court held "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. 454, 460 (1981). The rationale for this exception is the search prevents the arrestee from reaching for weapons or destuctible evidence. *See Chimel v. California*, 395 U.S. 752, 764 (1969).

In *United States v. Lugo*, we discussed the rationale of *Belton* and *Chimel*, and held a warrantless search incident to an arrest if not valid if remote in time or place from the arrest. 978 F. 2d 631, 634-45 (10th Cir. 1992). Thus, we concluded the search of the arrestee's passenger compartment was unlawful because it began after the suspect was arrested, removed from the scene, and en route to the police station. *Id. at 635.*

In 2004, the Supreme Court further defined when officers may search an automobile incident to a lawful arrest. *See Thornton v. United States*, 541 U.S. 615 (204). In *Thornton*, the officer saw the defendant get out of his car, then approached the

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[8] It was not argued that Weber conducted and inventory seach.

defendant on foot and asked for his driver's license. *Id.* at 618. The officer patted down the defendant, and found marijuana and cocaine in his pockets. *Id.* The officer arrested the defendant, handcuffed him, and placed him in the backseat of his patrol car. *Id.* The Fifth Circuit found the search to be reasonable under *Belton* because the defendant's car was in his immediate control. *Id.* at 619. The Supreme Court affirmed, holding "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to arrest." *Id.* at 623-24.

Reading *Belton, Lugo, and Thornton* together, we have held that a warrantless search can be lawful incident of an arrest where the arrestee is detained on-scene at the time of the search. *See United States v. Brothers,* 438 F.3d 1068, 1070, 1073 (10th Cir.) (holding a search conducted "two to three minutes after the defendant had been handcuffed and his pockets searched" was "valid as a search incident to a custodial arrest"), *cert. denied,* 126 S. Ct. 2946 (2006); *see also United States v. Martinez,* 30 Fed. Appx. 900, 903-04 (10th Cir. 2002) (unpublished))holding a search conducted after the defendant was arrested and placed in the back of the police car was valid as a search incident to arrest).[9] However, we have not upheld a search as a lawful incident of an arrest where the arrestee is in a patrol car enroute to

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[9] Unpublished Orders and Judgments are not precedential. We mention *Martinez* as we would an opinion from another circuit. It is persuasive only to the extent of its reasoned analysis. *See* 10th Cir. App. P. 21.1(A).

the police station at the time the search begins. In *United States v. Dennison,* we held we could not determine whether a search was incident to a lawful arrest because the district court had not made a finding as to the arrestee's location when the search began. 410 F.3d 1203, 1210 (10th Cir.) *cert. denied,* 546 U.S. 955 (2005).

Here, the district court cited *Belton* and *Thornton,* but not *Lugo.* Of more concern, the district court did not distinguish between Fisher's search of Brown's vehicle and Weber's search of Brown's vehicle. The court stated: "Fisher had probable cause to arrest plaintiff, who was a recent occupant of the vehicle. It was therefore reasonable for the officers to search the passenger compartment." (R. Vol. I. Soc. 40 at 11.) The court's conclusion in this regard glosses over the fact that the two searches were not contemporaneous. Fisher searched Brown's vehicle immediately after placing Brown in his patrol car, in order to retrieve Brown's billfold. Weber, on the other hand, did not search Brown's vehicle until after Fisher and Brown had left the scene.[10] Thus, viewing the disputed facts in the light most favorable to Brown, Fisher's search was incident to a lawful arrest, under *Brothers,* while Weber's was not, under *Lugo.*

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[10] This is a disputed fact-Weber argues he did not search Brown's vehicle, but saw the beer can in plain view from outside the truck. Weber did not argue, either in the district court or on appeal, that his search was an inventory search or that the beer can would have been the subject of inevitable discovery, though these appear to be reasonable arguments.

In order to defeat Weber's qualified immunity, Brown must establish not only that Weber's actions violated his Constitutional rights, he must also demonstrate that the right at issue (here, to be free from an unreasonable search) was clearly established at the time of the defendants' unlawful conduct. *See Medina,* 252 f.3d at 11 28. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Walker v. City of Orem,* 451 f. 3d 1189, 1151 (10th Cir. 2006) (quoting *Medina v. City & County of Denver,* 960 F.2d 1493, 1498 (10th Cir. 1992)). The law regarding the validity of a search conducted when the arrestee is being transported to a police station was "clearly established" by *Lugo,* decided in 1992. Thus, Weber is not entitled to summary judgment based on qualified immunity on Brown's unreasonable search claim.

We **DISMISS** Brown's appeal of the dismissal of his claims against the County for lack of jurisdiction, **REVERSE** the grant of summary judgment to Weber and **REMAND** for proceedings consistent with this order and judgment, as to Fisher's qualified immunity, the district court's judgment is **AFFIRMED.**

ENTERED FOR THE COURT
Terrence L. O'Brien
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207

ORDER
Filed November 21, 2007

Before **HENRY, BRISCOE,** and **O'BRIEN**, Circuit Judges.

Within 14 days of the date of this Order the Appellees are directed to file a response to the Petition For Rehearing. In their response, the Appellees should address the following questions: (1) whether, in light of Kan. Stat. Ann. § 22-2401(d), Officer Fisher and Officer Weber were authorized to arrest Mr. Brown for having an inoperable headlight; (2) if not, whether a lack of authority to arrest Mr. Brown under Kansas law renders his arrest unreasonable under the Fourth Amendment; (3) whether assuming that the officers violated Mr.

Brown's Fourth Amendment rights by arresting him without the authority to do so under state law, they are nevertheless entitled to qualified immunity because the Fourth Amendment law applicable to this case is not clearly established.

Entered for the Court
/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207

ORDER ON PETITION FOR REHEARING
Filed January 2, 2008

Before **HENRY, BRISCOE,** and **O'BRIEN,** Circuit Judges.

This matter is before the court on the petition for panel rehearing filed by Willie Brown on October 26, 2007. His petition contains nothing that would change the disposition of this appeal, but it raised an issue that warrants additional discussion.

Upon consideration, we grant the petition in part, withdraw the Order and Judgment issued on October 16, 2007, and substitute the attached Order and Judgment and concurrence. Apart from the

changes reflected in the substituted Order and Judgment, the petition for rehearing is denied.

Entered for the Court
/s/ Elisabeth A. Shumaker
Elisabeth A. Shumaker, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIE BROWN, Plaintiff-Appellant, v. SCOTT FISHER; J.J. WEBER; COUNTY OF MIAMI, Defendants-Appellees.	No. 06-3207 D. Kan. (D. C. No. 05-CV-2268-KHV)

ORDER AND JUDGMENT*

Before **HENRY, BRISCOE,** and **O'BRIEN**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Willie Brown was stopped by a police officer for a minor traffic violation. He refused to present his driver's license and, as a result, was arrested and spent a night in jail. At some point, his vehicle was searched by another officer and an open beer can was discovered in the cab of his pick-up truck. Brown brought this case against the two officers, Scott Fisher and J.J. Weber, and the County of Miami, Kansas, claiming a violation of his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. The district court allowed Weber to answer out of time, and then granted summary judgment in favor of Fisher and Weber. The district court dismissed Brown's claims against the County without prejudice for failure of service. Appearing *pro se*,[1] Brown appeals from these decisions. We dismiss in part, reverse in part, and affirm in part.

I. BACKGROUND

At 9:30 p.m. on February 25th, 2004, Miami County Deputy Sheriff Scott Fisher stopped Brown's truck because the passenger-side headlight was not illuminated.[2] Fisher approached Brown and asked to

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[1] We liberally construe Brown's pleadings, on account of his *pro se* status, but we hold Brown to the same rules of procedure as other litigants. *See Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992).

[2] Though not relevant to the issues raised on appeal, there was a fourteen-year-old passenger riding with Brown at the time of the stop.

see his driver's license. In response, Brown asked Fisher whether he had probable cause for the stop. Fisher responded that one of Brown's headlights was out and again asked to see Brown's driver's license. Brown asked if he was under arrest. Fisher replied he was not under arrest, but would be if he did not produce a driver's license. Fisher walked back to his patrol car and Brown got out of his truck to look for his license. Fisher ordered Brown back in the truck and called for backup. When Fisher returned to Brown's truck, Brown was sitting in the driver's seat, looking in his briefcase for his license.

Fisher arrested Brown, frisked him, handcuffed him, and placed him in the patrol car. Fisher then went to Brown's truck and found Brown's billfold in the briefcase. He searched the billfold in Brown's presence and discovered Brown's valid Kansas driver's license. At this point, Deputy Sheriff J.J. Weber arrived on-scene. Fisher removed Brown from the patrol car and Weber questioned Brown about his driver's license. Thereafter, Fisher transported Brown to the police station, which took between fifteen and twenty minutes. While Brown was in transport, Weber searched Brown's truck and found an open, non-alcoholic beer can in the passenger area.

At the station, Brown was issued a citation for driving with an open alcoholic beverage container and for failing to display a driver's license upon demand. Brown refused to post a $35.00 bond and spent the

night in the Miami County Jail. Brown was released the next morning.[3]

On June 27, 2005, Brown filed a complaint against Fisher, Weber and Miami County under 42 U.S.C. §1983, alleging violations of his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights. Fisher answered Brown's complaint on July 18, 2005. On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted this motion on August 10, 2005, without opinion. Both Fisher and Weber then filed motions for summary judgment on all claims, and the district court granted these motions on February 27, 2006. The court

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[3] If Brown was convicted this action would be barred. *Heck v. Humphrey*, 512 U.S. 477 (1994). The record is equivocal on that score. Brown alleges, in Paragraph 7 of his Complaint, he "appeared as directed on the ticket on March 25, 2004, at 9 A.M. in the Miami County courthouse before Judge Richard M. Smith, talked to the judge, and left. No charges were filed or prosecuted." Fisher and Weber deny the allegations contained in this paragraph, claiming they lack sufficient information to form a belief as to their truth or falsity. (R. Vol. 1, Doc. 5 at 2; Doc. 11 at 2.) In his Motion for Summary Judgment, Officer Fisher claims, as an uncontested material fact: "Brown was booked into the jail at about 10:30 p.m. He was released the next morning at about 7:30 a.m. by Undersheriff Mark Schmidt. He had been given a citation while in his jail cell which was delivered by one of the jailers." (R. Vol. 1, Doc. 22 at 7.) Fisher does not include any facts relating to the ultimate outcome of the citation. Brown testified at his deposition that he was delivered a citation in his jail cell. (R. Vol. 1, Doc. 22 attach. at 44) He also testified he showed up in court and his case was not called. (*Id.* at 47.) He claimed he did not ask why his case was not called, and did not know whether the case was still pending. (*Id.* at 50.) Reading the record most charitably to Brown, we assume he was not convicted.

determined that the allegations in Brown's complaint implicated only the Fourth Amendment, and Fisher and Weber were entitled to judgment as a matter of law because neither the arrest nor the search violated Brown's Fourth Amendment rights. The court ordered Brown to appear and show cause as to why his claims against the County should not be dismissed, based on his failure to allege "the County violated his rights through a County custom, practice or policy or by the act of a final decision-maker." Brown argued the merits of his case against the County, but the court did not consider the merits. Instead it dismissed Brown's claims against the County without prejudice for failure of service.

On appeal, Brown argues the district court erred by: (1) allowing Weber to answer out of time; (2) granting summary judgment to Fisher and Weber; and (3) dismissing Brown's claims against the County. We first consider Brown's claims against the County, and then his claims against Fisher and Weber.

II. DISCUSSION

A. *The County of Miami*

Brown filed his complaint on June 27, 2005. On July 1, 2005, Brown's process server served a copy of the summons and complaint upon an employee of the Clerk of the District Court of Miami County, Kansas. On July 6, 2005, Brown filed a proof of service upon Miami County, based upon serving the

Clerk of the District Court. Brown never served the Miami County Clerk or any member of the governing body of Miami County.[4]

The district court dismissed Brown's claims against the County without prejudice because Brown failed to properly serve the summons and complaint upon the County within 120 days of filing as required by Rule 12(m) of the Federal Rules of Civil Procedure ("if service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time ... "). While the court did not directly consider the merits of Brown's claims against the County, it did remark in a footnote that Brown had not alleged any policy or action by the county which violated his constitutional rights. On May 9, 2006, the district court entered a separate judgment, dismissing without prejudice Brown's claims against the County.

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[4] Pursuant to Rule 4(j)(2) of Federal Rules of Civil Procedure, service upon a state, municipal corporation or other governmental organization is effected by delivering a copy of the summons and complaint to its chief executive officer or by serving the summons and complaint "in the manner prescribed by the law of that state." Kansas law provides service upon a county is effected by serving one of the county commissioners, the county clerk, or the county treasurer. Kan. Stat. Ann. § 60-304(d)(1).

1. Jurisdiction

Before we consider the district court's dismissal of Brown's claims against the County, we must insure we have jurisdiction. Though neither party has raised a jurisdictional challenge, "we have an independent duty to examine our own jurisdiction." *Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1274 (10th Cir. 2001). Under 28 U.S.C. § 1291, only "final decisions" are appealable. *See* 28 U.S.C. § 1291 ("the courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..."). The question, then, is whether a dismissal without prejudice for failure of service of process constitutes a final, appealable decision.

In *Amazon*, we explained "[a]lthough a dismissal without prejudice is usually not a final decision, where the dismissal finally disposes of the case so that it is not subject to further proceedings in federal court, the dismissal is final and appealable." 273 F.3d at 1275. There, we held the district court's decision to decline supplemental jurisdiction and dismiss state claims without prejudice for refiling in state court effectively disposed of the entire action in federal courts and was thus ripe for review. *See id.* In *Moya v. Schollembarger*, we noted "a dismissal [ ] without prejudice does not necessarily make it non-final under Section 1291." 465 F.3d 444, 448 (10th Cir. 2006). We set forth three principles for determining whether an order of a district court is final and appealable. *Id.* at 450. The third principle is relevant here: "When the dismissal order expressly

grants the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss the complaint [not the entire action]; the dismissal is thus not a final decision." *Id.* at 451.

Here, it appears the district court did not intend to dismiss Brown's entire cause of action and finally dispose of his case. The court's order allowed Brown to re-file and properly serve his complaint upon the County. The court even indicated in a footnote what Brown might need to do to survive a motion to dismiss as to his claims against the County. Presumptively then, the order of dismissal was not final and appealable.[5] Though, as stated in *Moya*, a dismissal without prejudice is not necessarily non-final, it is here, where it invites a plaintiff to correct the procedural defect and re-file. We therefore dismiss this portion of Brown's appeal for lack of jurisdiction.[6]

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[5] This is not inconsistent with prior cases in which we reviewed orders of dismissal *with prejudice* for failure to comply with the Federal Rules of Procedure. *See, e.g. Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 (10th Cir. 2007) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to comply with the pleading requirements contained in Fed. R. Civ. P. 8); *Olsen v. Mapes*, F.3d 1199, 1200 (10th Cir. 2003) (reviewing dismissal with prejudice under Fed. R. Civ. P. 41(b) for failure to effectuate service under Fed. R. Civ. P. 4(i)).

[6] Brown's claims against the County are subject to a two-year statute of limitations. *See Wallace v. Kato*, 127 S.Ct. 1091, 1094, *reh'g denied*, 127 S.Ct. 1020 (2007) (statute of limitations applicable to § 1983 actions is what state law provides for personal injury torts). The dismissal of Brown's claims against the County more than two years after his cause of action

B. *Fisher and Weber*

On July 28, 2005, Weber filed a motion to answer out of time, claiming excusable neglect on account of defective service. The district court granted Weber's motion without opinion, allowing Weber to file and serve his answer within five days of the date of the order. The court later granted Fisher and Weber's motions for Summary judgment, holding the defendants were entitled to judgment as a matter of law on Brown's claim for violation of his rights under the Fourth amendment (according to the court, the only viable claim) because fisher had probable cause to arrest Brown and it was therefore reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle.

1. Jurisdiction

We continue to examine our jurisdiction. *See Amazon,* 273 F.3d at 1274. Generally, "A party

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accrued does not convert the dismissal without prejudice into a *de facto* dismissal with prejudice because Brown could have taken advantage of Kansas's tolling rules and refiled his complaint. *See Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959, 962 (10th Cir. 1991) ("Limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules.") (internal quotations and citation omitted); Kan. Stat. Ann. § 60-518 ("If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff ... may commence a new action within (6) months after such failure.").

cannot obtain appellate jurisdiction where the district court has dismissed one claim without prejudice because the case has not been fully disposed of in the lower court." *Jackson v. Volvo Trucks N. Am.., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006); *see also Catlin v. United States*, 324 U.S. 229 at 233 (1945), *superseded by statute*, 9 U.S.C. § 15 (generally, a decision is final under 28 U.S.C. § 1291 only when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). There is an exception to this general rule where the unadjudicated claims relate only to a defendant who was never served. Under this exception, an order finally disposing of the interests of all defendants who have been served is appealable because the unserved defendant was never made a proper party to the action. *See Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986). We find this exception to be applicable here.

In *Bristol*, we held the fact that two (of twenty-one) defendants were not considered in the district court's order and judgment "does not prevent the decision of the district court from being final." *Id.* We explained "[t]hese unserved defendants were made parties to this lawsuit. It was not necessary for the district court to enter an order dismissing them prior to its entry of the order and judgment." *Id.* (citations omitted). *Bristol* was cited by the Eleventh Circuit in *Insinga v. LaBella*, where it held when "final judgment has been entered as to all defendants who have been served with process and only unserved defendants remain, the district court's order may be considered final under U.S.C. § 1291 for purposes of

perfecting an appeal." 817 F.2d 1469, 1469-70 (11th Cir. 1987) (citing cases from the Tenth, Ninth, Second and Third Circuits).

In *Federal Savings & Loan Insurance Corporation v. Tullos-pierremont,* the Fifth Circuit expanded upon this analysis. 894 F.2d 1469 (5th Cir. 1990). The issue before the court was whether an appeal was timely where the plaintiff did not appeal immediately after the district court granted summary judgment to one of eight defendants, but rather, appealed only after seeking the dismissal without prejudice as to four defendants who had never been served (the other three defendants had been dismissed for lack of personal jurisdiction early on in the case). *Id.* at 1470-71. The court adopted a brightline rule: "where a judgment of dismissal is rendered as to all served defendants and only unserved, nonappearing defendants remain, the judgment is final, and therefore, appealable under section 1291, without a Rule 54(b) certificate." *Id.* at 1473. The court rejected a "further adjudication test" which would have meant a judgment of dismissal is only rendered final as to all served defendants if further adjudication as to the unserved defendants is unlikely. *Id.* The court reasoned the brightline rule provided a clearer rule for litigants, and cautioned the further adjudication test would "swallow the rule" because "in nearly every case [where no disposition has been made as to an unserved defendant] it is almost certain that at *some* time *some* further district

court action will be taken in the case respecting the claim against that [unserved] defendant." *Id.*[7]

While we decline to adopt the brightline rule, we hold the mere fact that there may be subsequent adjudication between Brown and the County does not prevent the judgments as to Fisher and Weber from being final. It would be a different case if Brown had voluntarily sought the dismissal of his claims against the County. We have previously held a plaintiff cannot voluntarily dismiss some of its claims without prejudice in order to make a non-voluntary dismissal with prejudice ripe for review. *See Cook v. Rocky Mountain Bank Note Co.,* 974 F. 2d 147, 148 (10th Cir. 1992); *Heimann v. Snead,* 133 F.3d 767, 769 (10th Cir. 1998). It would also be a different case if the alleged defect in service as to the County had not yet been adjudicated. *See Tullos-Pierremont,* 894 F.2d at 1474, n.5 (noting the case did not present, and the court did not speak to, a situation where all defendants were served, but the propriety of the service as to some was contested and either unresolved or sustained but without dismissal as to the contesting defendant). Because neither of these circumstances is presented here, we have jurisdiction to review the district court's orders allowing Weber to file his answer out of time and granting summary judgment in favor of Weber and Fisher.

2. Extension of Time to File an Answer

Brown contends the district court erred in permitting Weber to file his answer out of time, and

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[7] This case has been cited with approval, though not in this Circuit. *See, e.g. Garwood Packaging, Inc. v. Allen & Co.,* 378 F.3d 698, 700 (7th Cir. 2004).

should have instead granted default judgment against Weber based on his failure to answer. Under Rule 6(b) of the Federal Rules of Civil Procedure, the district court may permit the late filing of an answer if it finds the late filing resulted from "excusable neglect." We review a district court's decision extending time to file for abuse of discretion. *Panis v. Mission Hills Bank*, N.A., 60 F.3d 1468, 1494 (10th Cir. 1995). Weber argued to the district court that he should be granted an extension of time because Brown improperly served an administrative assistant at a Kansas Highway Patrol office who was not authorized to receive service of process on his behalf. According to Weber, the delay resulting from the improper service constituted "excusable neglect." The district court did not abuse its discretion in allowing Weber to file out of time on this basis.

3. Summary Judgment

The district court granted summary judgment to Fisher and Weber, concluding they were entitled to qualified immunity because Brown did not establish a violation of his rights under the Fourth Amendment. According to the district court, Fisher had probable cause to arrest Brown, and it was reasonable for Fisher and Weber to search the passenger compartment of Brown's vehicle incident to the arrest.

We review a district court's grant of summary judgment de novo. *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1197 (10th Cir. 2006). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing Fed. R. Civ. P. 56(c)). We review summary judgment

orders deciding qualified immunity somewhat differently from other summary judgment decisions. *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir. 2001). Where a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff, who must establish: (1) the defendant's actions violated a constitutional or statutory right; and (2) the right at issue was clearly established at the time of the defendant's unlawful conduct. *Id.* If the plaintiff fails to meet this "heavy two-part burden," the defendant is entitled to qualified immunity. *Id.*

The district court correctly granted summary judgment to Fisher because his arrest of Brown was reasonable, as was his search of Brown's vehicle. However, the district court erred in granting summary judgment to Weber because his search of Brown's vehicle was not reasonable, as it was conducted while Brown was being transported by Fisher to the police station.

A. Arrest

"If an officer has probable cause to believe that an individual has committed even a minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista,* 532 U.s. 318, 354 (2001). "The constitutionality of an arrest does not depend on the arresting officer's state of mind." *Apodaca v. City of Albuquerque,* 443 F.3d 1286, 1289 (10th Cir. 2006). "All that matters is whether [the officer] possessed

knowledge of evidence that would provide probable cause to arrest [the defendant] on some ground," *Id.*

The district court concluded Fisher had probable cause to arrest Brown for failing to display his driver's license upon demand, in violation of state law. *See* Kan. Stat. Ann. § 8-244 ("Every licensee shall have his or her driver's license in his or her immediate possession at all times when operating a motor vehicle, and shall display the same, upon demand of any . . . peace officer . . . ."). There are two difficulties with this conclusion. First, viewing the facts in the light most favorable to Brown, it is not clear that Brown refused to provide his license, as he testified he was looking for his license in his briefcase at the time of his arrest. Second, it is not clear that Fisher could detain Brown after finding Brown's valid license. We have held "[I]f the police learn information that destroys their probable cause to arrest a defendant, the arrest may become illegal." *United States v. Edwards,* 242 F.3d 928, 934 (10th Cir. 2001).

We need not resolve either of these difficulties, for we can affirm the district court on another basis supported in the record. *See Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1164 n.17 (10th Cir. 2004) ("we may affirm on any basis supported by the record.") Brown does not dispute that he was driving with an inoperable headlight at nighttime at the time he was pulled over. This constitutes a violation of state law. *See* Kan. Stat. Ann. § 8-1728(a) (requiring at least two (2) lighted headlamps"); Kan. Stat. Ann. § 8-1703(a)(1) ("Every vehicle ... upon a highway within

this state, at all times shall display lighted head and other lamps ... : [f]rom sunset to sunrise"). Brown contends a traffic infraction is not sufficient to establish probable cause for an arrest, because it is not an arrestable offense under Kansas law. *See* Kan. Stat. Ann. § 22-2401(d), ("[a] law enforcement officer may arrest a person ... [where] [a]ny crime, except a traffic infraction ... has been or is being committed by the person in the officer's view.") Brown is incorrect.

In *Atwater*, a person may arrest an individual without violating the Fourth Amendment so long as he has "probable cause to believe that an individual has committed even a minor criminal offense in his presence." 532 U.S. at 354[8]. A traffic infraction is a crime under Kansas law. *See* Kan. Stat. Ann. § 21-3105 ("A crime is an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is authorized, or in the case of a traffic infraction ... a fine is authorized ...") *City of Prairie Village v. Eddy*, 789 P.2d 66, 67 (Kan. Ct. App. 1990) (holding trial court erred in concluding a traffic infraction was not a crime because the Kansas legislature amended Kan. Stat. §21-3105 in 1984 to "include traffic infractions in the definition of crime.")

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[8] The issue in *Atwater* was "whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine." 532 U.S. at 323. Under Texas law, a seatbelt violation is an arrestable offense, though punishable only by a fine. *See id.*

Our case law suggests an arrest does not violate the Fourth Amendment when the arresting officer is within his jurisdiction and has probable cause to believe a crime has occurred, even if the crime is not one for which arrest is authorized under state law.[9] In *United States v. Green*, we stated "It is

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[9] We recognize there is authority to the contrary. *See Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004) (noting that the Circuits are divided on the issue of "whether an arresting officer's lack of authority under state or federal law to conduct an otherwise constitutionally valid arrest constitutes an unreasonable seizure under the Fourth Amendment.") *Compare United States v. Becerra-Garcia*, 397 F.3d 1167, 1173 (9th Cir. 2005) (holding "the reasonableness of a seizure depends exclusively on federal law" and noting "the well-established proposition that an arrest in violation of state law may still be constitutionally reasonable"); *United States v. Wright*, 16 F.3d 1429, 1437 (6th Cir. 1994) ("the appropriate inquiry for a federal court considering a motion to suppress evidence seized by state officers is whether the arrest ... violated the Fourth Amendment. The fact that the arrest ... may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended."); *United States v. Walker*, 960 F.2d 409, 416 (5th Cir. 1992) ("in determining whether to suppress the evidence at issue, the inquiry is whether the officers had probable cause to arrest [the defendant]); *with Cole v. Neb. State Bd. of Parole*, 977 F.2d 442, 444 (8th Cir. 1993) ("An arrest by a state actor that is not authorized under state law is actionable under § 1983 as a seizure contrary to the Fourth Amendment."); *Malone v. County of Suffolk*, 968 F.2d 1480, 1482-83 (2nd Cir. 1992) (whether officers have valid authority to arrest pursuant to state law affects constitutionality of arrest); *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989) ("the reasonableness of an arrest depends upon the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer

... well established in this circuit that in federal prosecutions the test of reasonableness in relation to the Fourth Amendment protected rights must be determined by Federal law even though the police actions are those of state police officers." 178 F.3d 1099, 1105 (10th Cir. 1999) (quotations omitted); *see also United States v. Le*, 178 F.3d 1258, 1264 (10th Cir. 1999) (same). In other words, although "the question of compliance with state law may well be relevant in determining whether police conduct was reasonable for Fourth Amendment purposes," a "violation of state law is not, without more, necessarily a federal constitutional violation." *United States v. Mikulski*, 317 F.3d 1228, 1232 (10th Cir. 2003) (quotations omitted).

In *Wilder v. Turner*, we considered "whether an officer has probable cause to arrest a driver that refuses to submit to a roadside sobriety test after the officer observes certain indicia of alcohol consumption." 490 F.3d 810, 811 (10th Cir. 2007). The district court has concluded the arrest violated the Fourth Amendment, "[d]eriving the legal framework for its probable cause determination exclusively from Colorado case law." *Id.* at 813. We reversed, reasoning:

[A] violation of state law cannot give rise to a claim under Section 1983. Section 1983 does not ... provide a basis for redressing violations of *state law*, but only for those violations of *federal law* done under color of state law. While it is true that state

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authorized by state and or municipal law to effect a custodial arrest for the particular offense.")

law with respect to arrest is looked to for guidance as to the validity of the arrest since the officers are subject to those local standards, it does not follow that state law governs.

Id. at 814 (quotations and citations omitted). Similarly, in *Apodaca*, we noted "there is no Fourth Amendment impediment to ... arrest" where the police officer had probable cause to arrest for a misdemeanor, even though the misdemeanor was not an arrestable offense under state law. 443 F.3d at 1289, n.2.

The Eighth Circuit reached the same result in a factually similar case. *United States v. Bell*, 54 F.3d 502 (8th Cir. 1995). The defendant in *Bell* was stopped by two police officers for riding a bicycle without a headlight in violation of Iowa law. The officers arrested the defendant for the violation then conducted a search incident to the arrest, which revealed Bell was carrying cocaine in his shoe. The district court granted Bell's motion to suppress concluding Bell's arrest was unlawful under Iowa law because the Iowa statutes permit only a citation, not an arrest, for operating a bicycle without a helmet. The Eighth Circuit concluded the district court erred in looking to Iowa law to determine the lawfulness of Bell's arrest. The court explained: "[W]e do not think Fourth Amendment analysis requires reference to an arrest's legality under state law. An arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause." *Id.* at 504 (citations omitted).

The Third Circuit recently analyzed this same issue and reached the same result. *See United States v. Laville*, 480 F.3d 187 (3rd Cir. 2007). In Laville, the district court concluded that, when the officers arrested the defendant without a warrant, they had "[a]t most" probable cause to believe the defendant had entered the United States illegally in violation of 8 U.S.C. § 1325, which constitutes a misdemeanor. *Id.* at 191. Under Virgin Islands, law, a misdemeanor must be committed in the presence of an officer to justify a warrantless arrest. *Id.* The court granted Laville's motion to suppress his post-arrest statements, concluding he was arrested in violation of the Fourth Amendment because the crime of illegal entry was committed before the officers arrived. *Id.*

The Third Circuit reversed, holding "the unlawfulness of an arrest under state or local law does not make the arrest unreasonable per se under the Fourth Amendment; at most, the unlawfulness is a factor for federal courts to consider in evaluating the totality of the circumstances surrounding the arrest." *Id.* at 196. The court reasoned a per se rule could result in "fifty different constitutional standards of arrest, each one dictated by a repsective state's positive and decisioinal law...." *Id.* at 193. Moreover, such a rule "could well create disparity in the constitutionality of arrests performed by state and federal officers for the same offense within the same state or territory." *Id.* Thus, "the validity of an arrest under state law must never be confused or conflated with the Fourth Amendment concept of reasonableness ..." *Id.* at 192. In a footnote, the court noted "[o]ther courts of appeal are in accord."

Id. at 192, n.2 (citing cases from the Seventh, Eighth and Tenth Circuits).

Based on our precedent and in light of the reasoning of *Bell* and *Laville*, we hold Brown cannot establish that his Fourth Amendment rights were violated by Fisher's arrest. Though the arrest was not authorized under Kansas, law, Fisher had probable cause to believe a criminal offense - albeit a very minor one - had been committed in his presence. Thus, Fisher is entitled to qualified immunity on Brown's claim for unlawful arrest.

B. The Search of Brown's Vehicle

While a search conducted without a warrant is usually per se unreasonable, warrantless searches are permissible under certain "well-delineated exceptions." *United States v. Franco,* 981 F.2d 470, 472 (10th Cir. 1992). For example, a warrant is not required for a search "incident to an arrest."[10] *Id.* In *New York v. Belton,* the Supreme Court held "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. 454, 460 (1981). The rationale for this exception is the search prevents the arrestee from reaching for weapons or destuctible evidence. *See Chimel v. California,* 395 U.S. 752, 764 (1969).

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10 It was not argued Weber conducted an inventory search.

In *United States v. Lugo,* we discussed the rationale of *Belton* and *Chimel,* and held a warrantless search incident to an arrest if not valid if remote in time or place from the arrest. 978 F. 2d 631, 634-45 (10th Cir. 1992). Thus, we concluded the search of the arrestee's passenger compartment was unlawful because it began after the suspect was arrested, removed from the scene, and en route to the police station. *Id. at 635.*

In 2004, the Supreme Court further defined when officers may search an automobile incident to a lawful arrest. *See Thornton v. United States,* 541 U.S. 615 (204). In *Thornton,* the officer saw the defendant get out of his car, then approached the defendant on foot and asked for his driver's license. *Id.* at 618. The officer patted down the defendant, and found marijuana and cocaine in his pockets. *Id.* The officer arrested the defendant, handcuffed him, and placed him in the backseat of his patrol car. *Id.* The Fifth Circuit found the search to be reasonable under *Belton* because the defendant's car was in his control. *Id.* at 619. The Supreme Court affirmed, holding "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to arrest." *Id.* at 623-24.

Reading *Belton, Lugo, and Thornton* together, we have held that a warrantless search can be lawful incident of an arrest where the arrestee is detained on-scene at the time of the search. *See United States v. Brothers,* 438 F.3d 1068, 1070, 1073 (10th Cir.)

(holding a search conducted "two to three minutes after the defendant had been handcuffed and his pockets searched" was "valid as a search incident to a custodial arrest"), *cert. denied,* 126 S. Ct. 2946 (2006); *see also United States v. Martinez,* 30 Fed. Appx. 900, 903-04 (10th Cir. 2002) (unpublished)) holding a search conducted after the defendant was arrested and placed in the back of the police car was valid as a search incident to arrest).[11] However, we have not upheld a search as a lawful incident of an arrest where the arrestee is in a patrol car enroute to the police station at the time the search begins. In *United States v. Dennison,* we held we could not determine whether a search was incident to a lawful arrest because the district court had not made a finding as to the arrestee's location when the search began. 410 F.3d 1203, 1210 (10th Cir.) *cert. denied,* 546 U.S. 955 (2005).

Here, the district court cited *Belton* and *Thornton,* but not *Lugo.* Of more concern, the district court did not distinguish between Fisher's search of Brown's vehicle and Weber's search of Brown's vehicle. The court stated: "Fisher had probable cause to arrest plaintiff, who was a recent occupant of the vehicle. It was therefore reasonable for the officers to search the passenger compartment." (R. Vol. I. Soc. 40 at 11.) The court's conclusion in this regard glosses over the fact that the

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[11] Unpublished Orders and Judgments are not precedential. We mention *Martinez* as we would an opinion from another circuit. It is persuasive only to the extent of its reasoned analysis. *See* 10th Cir. R. App. P. 21.1(A).

two searches were not contemporaneous. Fisher searched Brown's vehicle immediately after placing Brown in his patrol car, in order to retrieve Brown's billfold. Weber, on the other hand, did not search Brown's vehicle until after Fisher and Brown had left the scene.[12] Thus, viewing the disputed facts in the light most favorable to Brown, Fisher's search was incident to a lawful arrest, under *Brothers,* while Weber's was not, under *Lugo.*

In order to defeat Weber's qualified immunity, Brown must establish not only that Weber's actions violated his Constitutional rights, he must also demonstrate that the right at issue (here, to be free from an unreasonable search) was clearly established at the time of the defendants' unlawful conduct. *See Medina,* 252 f.3d at 11 28. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Walker v. City of Orem,* 451 f. 3d 1189, 1151 (10th Cir. 2006) (quoting *Medina v. City & County of Denver,* 960 F.2d 1493, 1498 (10th Cir. 1992)). The law regarding the validity of a search conducted when the arrestee is being transported to a police station was "clearly established" by *Lugo,* decided in 1992. Thus, Weber is not entitled to

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[12] This is a disputed fact-Weber argues he did not search Brown's vehicle, but saw the beer can in plain view from outside the truck. Weber did not argue, either in the district court or on appeal, that his search was an inventory search or that the beer can would have been the subject of inevitable discovery, though these appear to be reasonable arguments.

summary judgment based on qualified immunity on Brown's unreasonable search claim.

We **DISMISS** Brown's appeal of the dismissal of his claims against the County for lack of jurisdiction, **REVERSE** the grant of summary judgment to Weber and **REMAND** for proceedings consistent with this order and judgment, as to Fisher's qualified immunity, the district court's judgment is **AFFIRMED.**

ENTERED FOR THE COURT
Terrence L. O'Brien
Circuit Judge

No. 06-3207, Brown v. Fisher

HENRY, J., concurring,

I agree with the majority's disposition of Mr. Brown's claims against Officer Fisher and Officer Weber. I also agree that Mr. Brown's appeal of the dismissal of his claims against County should be dismissed for lack of jurisdiction. I write separately because of my concerns about Mr. Brown's claim against Officer Fisher for an unlawful arrest. In particular, I am troubled by Officer Fisher's conceded lack of state law authority to arrest Mr. Brown for a minor traffic offense - driving with an inoperable headlight at nighttime. Unlike the majority, I think that an arrest made by an officer lacking authority under state law may be unreasonable under the

Fourth Amendment, even if supported by probable cause.

Initially, I note that the Supreme Court's decision in Atwater v. City of Lago Vista, 532 U.S. 318 (2001), does not resolve this issue. There, Texas law expressly authorized any peace officer [to] arrest without warrant a person found committing a violation of [certain] seatbelt laws." Id. at 323 (citations omitted). Thus, the court was not required to address the Fourth Amendment principles that would apply

when, as here, state law authority for the arrest was lacking. As to the law of this circuit, our cases do establish that state law is not controlling in determining whether state officers have violated the Fourth Amendment. Nevertheless, state law may be relevant, and even crucial. See United States v. Mikulski, 317 F.3d 1228, 1232 (10th Cir. 2003) ([T]he question of compliance with state law may well be relevant

in determining whether police conduct was reasonable for Fourth Amendment purposes.") (quoting United States v. Baker, 16 F.3d 854, 856, n.1 (8th Cir. 1994). For example, in

Marshal v. Columbia Lea Regional Hospital, 345 F.3d 1157, 1175 (10th Cir. 2003), we looked to New Mexico law in considering whether there were exigent circumstances sufficient to justify a search. And with regard to traffic

stops, state or local law often determines whether the initial detention is reasonable. See United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995) (en banc) (holding that "a traffic stop is valid under the

Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring").

For me, the difficulty here is that our cases do not set forth a clear standard for determining when a state law violation may render an officer's conduct unreasonable under the Fourth Amendment. In his concurring and dissenting opinion in Abbot v. City of Crocker, 30 F.3d 994 (8th Cir. 1994), the late Judge Richard Arnold offers helpful guidance.

In Judge Arnold's view, "the key issue in determining whether a violation of state law constitutes a violation of the Fourth Amendment, in the context of an arrest, is whether the statute in question is designed to protect individuals from police behavior that would otherwise be unreasonable." Id. at 1000. (Arnold, J. concurring in part and dissenting in part). For Judge Arnold, that reasonableness inquiry requires the court to consider the policies and interests underlying the statutory prohibition of such arrests. Id. Thus, an officer's violation of a state or local statute may render his or her conduct unreasonable if that statute "helps to protect the very interests underlying the Fourth Amendment, those of the individual in privacy and personal freedom, and, [that] at the same time, balances the interests of government in protecting society and making arrests in a safe, efficient, and constitutional manner." Id.; see also Cole v. Neb. Bd. of Parole, 997 F.2d 442, 444 (8th Cir. 1992) ("An arrest by a state actor that is not

authorized by state law is actionable under § 1983 as a seizure contrary to the Fourth Amendment.")

In this case, rather than holding Officer Fisher's lack of state law authority to arrest Mr. Brown is irrelevant to the Fourth Amendment question, I would undertake the inquiry suggested by Judge Arnold. Arguably, Kansas' limitation on police officer's authority to make arrests for minor traffic offenses protects important Fourth Amendment interests. Surely, for a motorist, the difference between merely receiving a citation for such an offense and being transported to jail may be substantial indeed. In that context, I do not think that the fact that there was probable cause that a motorist committed the offense should end the Fourth Amendment reasonableness inquiry.

I acknowledge that our court's decision in United States v. Apodaca, 443 F.3d 1286, 1289 (10th Cir. 2006), does not follow Judge Arnold's approach. Indeed, some of the reasoning in *Apodaca* provides direct support for the majority's view.

However, I do not regard the statements in Apodaca cited by the majority as the law of the circuit. The Apodaca panel was responding to contentions made at oral argument that do not appear to have been made in the briefs and that were not necessary to the disposition of the case. See id. at 1289-90 (noting that the appellant's "sole preserved challenge to her arrest "was that "[a police officer] lacked probable cause to believe that she had violated a restraining order" and thereby suggesting that the

discussion in footnote 2 regarding the significance of a lack of authority to arrest was dicta).

Nevertheless, in light of the conflicting authority cited by the majority, it is evident that Judge Arnold's approach is not clearly established. Thus, I agree that Officer Fisher is entitled to qualified immunity on Mr. Brown's claim for an unlawful arrest.